



## **Agricultural Marketing Service**

### **7 CFR Part 984**

[Doc. No. AO-SC-20-J-0011; AMS-SC-19-0082; SC19-984-1]

## **Walnuts Grown in California; Order Amending Marketing Order No. 984.**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends Marketing Order No. 984, which regulates the handling of walnuts grown in California. The amendments were proposed by the California Walnut Board (Board) and add the authority for the Board to provide credit for certain market promotion expenses paid by handlers against their annual assessments due under the Order and establish requirements to effectuate the new authority. In addition, the Agricultural Marketing Service (AMS) made necessary changes to conform to the amendments adopted.

**DATES:** This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Matthew Pavone, Chief, Rulemaking Services Branch, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, Stop 0237, Washington, DC 2025-0237; Telephone: (202) 720-2491, or Andrew Hatch, Acting Director, Marketing Order and Agreement Division, Specialty

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Small businesses may request information on this proceeding by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, Stop 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, or E-mail: Richard.Lower@usda.gov.

**SUPPLEMENTARY INFORMATION:** Prior documents in this proceeding: Notice of Hearing issued on February 2, 2020, and published in the February 11, 2020, issue of the **Federal Register** (85 FR 7669); a Correction to the Notice of Hearing issued on April 9, 2020, and published in the April 10, 2020, issue of the **Federal Register** (85 FR 20202); a Recommended Decision issued on July 8, 2020, and published in the August 5, 2020, issue of the **Federal Register** (85 FR 47305); and a Secretary's Decision and Referendum Order issued October 5, 2020, and published in the October 20, 2020, issue of the **Federal Register** (85 FR 66491).

This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Orders 12866, 13563, and 13175.

Notice of this rulemaking action was provided to tribal governments through the Department of Agriculture's (USDA) Office of Tribal Relations.

### **Preliminary Statement**

This action finalizes amendments to regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing Order No. 984, as amended (7 CFR part 984), regulating the handling of walnuts grown in California. Part 984 (referred to as the "Order") is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." The final rule was formulated on the record of a public hearing held via videoconference technology on April 20 and 21, 2020. The hearing was held pursuant to the provisions of the Act, and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900). Notice of this hearing was published in the **Federal Register** on February 11, 2020 (85 FR 7669) followed by a Correction to the Notice of Hearing issued on April 9, 2020, and published in the April 10, 2020, issue of the **Federal Register** (85 FR 20202). The notice of hearing contained one proposal submitted by the Board and one submitted by USDA.

Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of AMS on July 8,

2020, filed with the Hearing Clerk, USDA, a Recommended Decision and Opportunity to File Written Exceptions thereto by September 4, 2020. No exceptions were filed.

A Secretary's Decision and Referendum Order was published in the **Federal Register** on October 20, 2020 (85 FR 66491), directing that a referendum be conducted during the period of November 30 through December 11, 2020, among eligible California walnut growers to determine whether they favored the proposed amendments to the Order. To become effective, per the Order, the amendments had to be approved by at least two-thirds of those growers voting, or by voters representing at least two-thirds of the volume of walnuts represented by voters voting in the referendum. The amendment to add credit back authority and establish requirements to effectuate the new authority was favored by 80.5 percent of the growers voting in the referendum, representing 82.8 percent of the total volume of walnuts produced by those voting.

The amendments favored by voters and included in this final order authorize the Board to provide credit for certain market promotion expenses paid by handlers against their annual assessments due under the Order and would establish requirements to effectuate the new authority.

AMS also recommended changes as were necessary to the Order so that all the Order's provisions conform to the effectuated amendments one to the language in § 984.46(a)

and the other to the regulatory text in § 984.546(e) (5) (iii). The language in § 984.46(a) adds credit-back authority to the Order. USDA has determined that the language presented in the Notice of Hearing lacked a reference to the proposed, new paragraph (b) and only included a reference to proposed, new paragraph (c). USDA revised the language so that both new paragraphs are referenced in the regulatory text of this decision. USDA also made a clarifying change to the regulatory text in § 984.546(e) (5) (iii). The originally proposed wording of this paragraph by the Board does not adequately state that in all promotional activities, regardless of whether a handler is operating independently or in conjunction with a manufacturer, or whether promoting a product that is solely walnut content or walnuts are a partial ingredient, the words "California Walnuts" must be included in the labeling in order for that activity to qualify as a creditable expenditure. The revised language is included in the regulatory text of this decision.

#### **Small Business Considerations**

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), AMS has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit.

### **Walnut Industry Background and Overview**

According to the hearing record, there are approximately 4,400 producers and 92 handlers in the production area. Record evidence includes reference to a study showing that the walnut industry contributes 85,000 jobs to the economy, directly and indirectly.

A small handler as defined by the SBA (13 CFR 121.201) is one that grosses less than \$30,000,000 annually. A small grower is one that grosses less than \$1,000,000 annually.

Record evidence showed that approximately 82 percent of California's walnut handlers (75 out of 92) shipped merchantable walnuts valued under \$30 million during the 2018-2019 marketing year and would therefore be considered small handlers according to the SBA definition.

Data in the hearing record from the 2017 Agricultural Census, published by USDA'S National Agricultural Statistics Service (NASS), showed that 86 percent of

California farms growing walnuts had walnut sales of less than \$1 million.

In an alternative computation using NASS data from the hearing record, the 3-year average crop value (2016-2017 to 2018-2019) was \$1.24 billion. Average bearing acres over that same 3-year period were 333,000. Dividing crop value by acres yields a revenue per acre estimate of \$3,733. Using these numbers, it would take approximately 268 acres ( $\$1,000,000 / \$3,733$ ) to yield \$1 million in annual walnut sales. The 2017 Agricultural Census data show that 80 percent of walnut farms in 2017 were below 260 acres. Therefore, well over three-fourths of California walnut farms would be considered small businesses according to the SBA definition.

During the hearing held April 20 and 21, 2020, interested parties were invited to present evidence on the probable regulatory impact of the amendments to the Order on small businesses. The evidence presented at the hearing shows that none of the amendments would have a significant economic impact on a substantial number of small agricultural growers or firms.

### **Material Issues**

This action amends the Order to add authority to provide credit for market promotion expenses paid by handlers against their annual assessments due under the Order and establishes rules and regulations to effectuate

the new authority. These authorities will help build towards increasing domestic demand and utilizing the industry's expanding supply of walnuts.

During the hearing held on April 20 and 21, 2020, interested persons were invited to present evidence on the probable regulatory and informational impact of the amendments to the Order on small businesses. The evidence presented at the hearing shows that the amendments would have no burdensome effects on small agricultural producers or firms.

The hearing record shows that most of the grower and handler witnesses stated that a key reason for seeking credit-back authority was the need to increase demand after years of unfavorable marketing conditions. Witnesses stated that a key factor in their support of seeking new ways to increase market demand was several years of deteriorating profitability.

Record evidence indicates that all industry members, growers and handlers, will benefit proportionally from an increase in demand brought about due to the credit-back program. The credit-back program will be funded by allocating to the credit-back program a portion of the total Board promotional budget, funded at the current assessment rate. With no increase in the Board's assessment rate, there will be no increased costs to growers or handlers.



All handlers, large and small, will benefit proportionally by participating in the credit-back program. Handlers will participate only if they decide that they will benefit, and will incur no costs if they choose not to participate. No handler can benefit disproportionately from the program, since a handler's maximum credit-back payment from the Board is based on that handler's share of total industry acquisitions from the prior year, according to the hearing record.

The record shows that the proposal to add authority to establish the credit-back program would, in itself, have no significant economic impact on producers or handlers of any size. Costs of complying with the new program will include handler maintenance and delivery of receipts and documentation for reimbursement of creditable expenditures, but these will be minimal and are considered standard business practices.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this final rule. These amendments are intended to improve the operation and administration of the Order and to assist in the marketing of California walnuts.

#### **Paperwork Reduction Act**

Current information collection requirements that are part of the Federal marketing order for California walnuts (7 CFR part 984) are approved under OMB No. 0581-0178

Vegetables and Specialty Crops. No changes in these requirements are anticipated as a result of this proceeding. Should any such changes become necessary, they would be submitted to OMB for approval.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the Government Paperwork Elimination Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

#### **Civil Justice Reform**

The amendments to the Order proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this proposal.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and

request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of entry of the ruling.

**Order Amending the Order Regulating the Handling of Walnuts Grown in California<sup>1</sup>**

Findings and Determinations

The findings and determinations hereinafter set forth are supplementary to the findings and determinations that were previously made in connection with the issuance of the Marketing Order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(a) Findings and Determinations Upon the Basis of the Hearing Record

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and the applicable rules of practice and procedure

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<sup>1</sup> This Order shall not become effective unless and until the requirements of §900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

effective thereunder (7 CFR part 900), a public hearing was held upon proposed further amendment of Marketing Order No. 984, regulating the handling of walnuts grown in California.

Upon the basis of the record, it is found that:

(1) The marketing order, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

(2) The marketing order, as amended, and as hereby proposed to be further amended, regulates the handling of walnuts grown in the production area in the same manner as, and is applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing order upon which a hearing has been held;

(3) The marketing order, as amended, and as hereby proposed to be further amended, is limited in its application to the smallest regional production area that is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

(4) The marketing order, as amended, and as hereby proposed to be further amended, prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due

recognition to the differences in the production and marketing of walnuts grown in California; and

(5) All handling of walnuts grown in the production area as defined in the marketing order is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

#### **Order Relative to Handling**

It is therefore ordered, that on and after the effective date hereof, all handling of walnuts grown in California shall be in conformity to, and in compliance with, the terms and conditions of the said order as hereby proposed to be amended as follows:

The provisions of the proposed marketing order amending the order contained in the Recommended Decision issued on July 8, 2020, and published in the August 5, 2020, issue of the **Federal Register** (85 FR 47305) will be and are the terms and provisions of this order amending the order and are set forth in full herein.

#### **List of Subjects in 7 CFR Part 984**

Marketing agreements, Nuts, Reporting and recordkeeping requirements, Walnuts.

Accordingly, AMS amends 7 CFR part 984 as follows:

#### **PART 984 - WALNUTS GROWN IN CALIFORNIA**

1. The authority citation for 7 CFR part 984 continues to read as follows:

**Authority:** 7 U.S.C. 601-674.

2. Revise §984.46 to read as follows:

**§984.46 Research and development.**

(a) *Research and development authorities.* The Board, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research and development projects, and marketing promotion, including paid advertising, designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of walnuts. The expenses of such projects shall be paid from funds collected pursuant to §§984.69 and 984.70 and may be credited back pursuant to paragraphs (b) and (c) of this section.

(b) *Credit-back for promotion expenses.* The Board may provide for crediting the pro rata expense assessment obligations of a handler with such portion of his or her direct expenditure for marketing promotion, including paid advertising, as may be authorized. The credit-back amount available to each handler shall be determined by that handler's percent of the industry's total volume of walnuts handled during the prior marketing year multiplied by the current marketing year's credit-back program budget. No handler shall receive credit-back for any creditable expenditures that would exceed the total amount of credit-back available to him or her for the applicable marketing year. Further, no handler shall receive credit-back in an

amount that exceeds that handler's assessments paid in the applicable marketing year at the time the credit-back application is made. Marketing promotion expenses shall be credited at a rate recommended by the Board and approved by the Secretary, where the credit rate is based on the amount per dollar of marketing promotion expenses for creditable expenditures paid by a handler during the applicable marketing year. Credit may be paid directly to the handler as a reimbursement of assessments paid or may be issued as recommended by the Board and approved by the Secretary. The Board may also establish, subject to the approval of the Secretary, different credit rates for different products or different marketing promotion activities according to priorities determined by the Board and its marketing plan.

(c) *Creditable expenditures.* The Board, with the approval of the Secretary, may credit-back all or any portion of a handler's direct expenditures for marketing promotion including paid advertising that promotes the sale of walnuts, walnut products or their uses. Such expenditures may include, but are not limited to, money spent for advertising space or time in newspapers, magazines, radio, television, transit, and outdoor media, including the actual standard agency commission costs not to exceed 15 percent, or as otherwise recommended by the Board and approved by the Secretary.

3. Add subpart D, consisting of §984.546, to read as follows:

**Subpart D - Research and Development Requirements**

**§984.546 Credit for marketing promotion activities, including paid advertising.**

(a) *Timeliness of reimbursement claim and credit-back rate.* For a handler to receive credit-back for his or her own marketing promotional activities pursuant to §984.46, the Board shall determine that such expenditures meet the applicable requirements of this section. Credit-back may be granted in the form of reimbursement for all creditable expenditures paid within the applicable marketing year subject to the effective credit-back rate; *Provided*, that such creditable expenditures are documented to the satisfaction of the Board within 15 days after the end of that marketing year. Credit may be granted for a handler's creditable expenditures in an amount not to exceed that handler's pro-rata share of the credit-back fund. No more than 70 cents (\$0.70) shall be credited back to a handler for every dollar spent on qualified activities.

(b) *Assessment payments.* The handler assessment is due as defined in §984.69. A handler shall be current on all assessment payments prior to receiving credit-back for creditable expenditures.

(c) *Handler eligibility for reimbursement.* The Board shall grant credit-back for qualified activities only to



the handler who performed such activities and who filed a claim for credit-back in accordance with this section.

(d) *Applicability to marketing year.* Credit-back shall be granted only for creditable expenditures for qualified activities that are conducted and completed during the marketing year for which credit-back is requested.

(e) *Qualified activities.* The following requirements shall apply to all creditable expenditures resulting from qualified activities:

(1) Credit-back granted by the Board shall be that which is appropriate when compared to accepted professional practices and rates for the type of activity conducted. In the case of claims for credit-back activities not covered by specific and established criteria, the Board shall grant the claim if it is consistent with practices and rates for similar activities.

(2) The clear and evident purpose of each qualified activity shall be to promote the sale, consumption or use of California walnuts.

(3) No credit-back will be given for any activity that targets the farming or grower trade.

(4) Credit-back will not be allowed in any case for travel expenses, or for any promotional activities that result in price discounting.

(5) Credit-back shall be granted for those qualified activities specified in paragraphs (e)(5)(i) through (iv) of this section:

(i) Credit-back shall be granted for paid media directed to end-users, trade or industrial users, and for money spent on paid advertising space or time, including, but not limited to, newspapers, magazines, radio, television, online, transit and outdoor media, and including the standard agency commission costs not to exceed 15 percent of gross.

(ii) Credit-back shall be granted for market promotion other than paid advertising, for the following activities:

(A) Marketing research (except pre-testing and test-marketing of paid advertising);

(B) Trade and consumer product public relations: Provided, that no credit-back shall be given for related fees charged by an advertising or public relations agency;

(C) Sales promotion (in-store demonstrations, production of promotional materials, sales and marketing presentation kits, etc., excluding couponing); and

(D) Trade shows (booth rental, services, and promotional materials).

(iii) For any qualified activity involving a handler promoting branded products, a handler selling multiple complementary products, including other nuts, with such activity including the handler's name or brand, or joint

participation by a handler and a manufacturer or seller of a complementary product(s), the amount allowed for credit-back shall reflect that portion of the activity represented by walnuts. If the product is owned or distributed by the handler, in order to receive any amount of credit-back, the product must list the ownership or distributorship on the package and display the handler's name and the handler's brand. The words "California Walnuts" must be included on the primary, face label. Such activities must also meet the requirements of paragraphs (e)(1) through (5) of this section.

(iv) If the handler is engaged in marketing promotion activities pursuant to a contract with the Foreign Agricultural Service (FAS), USDA, and/or the California Department of Food and Agriculture (CDFA), unless the Board is administering the foreign marketing program, such activities shall not be eligible for credit-back unless the handler certifies that he or she was not and will not be reimbursed by either FAS or CDFA for the amount claimed for credit-back, and has on record with the Board all claims for reimbursement made to FAS and/or the CDFA. Foreign market expenses paid by third parties as part of a handler's contract with FAS or CDFA shall not be eligible for credit-back.

(6) A handler must file claims with the Board to obtain credit-back for creditable expenditures, as follows:

(i) All claims submitted to the Board for any qualified activity must include:

(A) A description of the activity and when and where it was conducted;

(B) Copies of all invoices from suppliers or agencies;

(C) Copies of all canceled checks or other proof of payment issued by the handler in payment of these invoices; and

(D) An actual sample, picture or other physical evidence of the qualified activity.

(ii) Handlers may receive reimbursement of their paid assessments up to their pro-rata share of available dollars to be based on their percentage of the prior marketing year crop total. In all instances, handlers must remit the assessment to the Board when billed, and reimbursement will be issued to the extent of proven, qualified activities.

(iii) Checks from the Board in payment of approved credit-back claims will be mailed to handlers within 30 days of receipt of eligible claims.

(iv) Final claims for the marketing year pertaining to such qualified activities must be submitted with all required elements within 15 days after the close of the Board's marketing year.

(f) *Appeals*. If a determination is made by the Board staff that a particular marketing promotional activity is not eligible for credit-back because it does not meet the

criteria specified in this section, the affected handler may request the Executive Committee review the Board staff's decision. If the affected handler disagrees with the decision of the Executive Committee, the handler may request that the Board review the Executive Committee's decision. If the handler disagrees with the decision of the Board, the handler, through the Board, may request that the Secretary review the Board's decision. Handlers have the right to request anonymity in the review of their appeal. The Secretary maintains the right to review any decisions made by the aforementioned bodies at his or her discretion.

Bruce Summers, Administrator,

Agricultural Marketing Service.

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